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38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

—against—

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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INDEX

TABLE OF AUTHORITIES

Cases:

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MOTION TO AFFIRM

The appellees, in accordance with Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the decision below is so manifestly correct and the questions presented so unsubstantial as not to warrant further argument.

Statement

This is a direct appeal from the final judgment and decree entered on July 2, 1975, by a district court of three judges[1] constituted pursuant to 28 U.S.C. §§2281 and 2284.[2] The court declared Section 6811(8) of the New York State Education Law to be unconstitutional under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and permanently enjoined enforcement of such statute.[3] Section 6811(8) reads as follows:

"It shall be a class A misdemeanor for:

• • • • •

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited."[4]

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[1] Consisting of Senior Circuit Judge Friendly, and District Judges Pierce and Conner.

[2] Appellees' motion seeking an order convening a three-judge court was granted by Judge Pierce in an opinion reported at 383 F. Supp. 543 (S.D.N.Y. 1974).

[3] The statute was challenged—and declaratory and injunctive relief granted—only insofar as the statute affects non-prescription contraceptives and devices. Appellees do not contest the statute with regard to products requiring a prescription.

[4] The injunction as to the advertising and display provisions of the statute was stayed for 120 days in order to enable the state legislature to enact "narrower provisions" to "reflect appropriate constitutional concerns." See Opinion of three-judge court, annexed in appellants' jurisdictional statement as Appendix A (referred to as p. ....a), at p. 29a. The legislature has enacted no such provisions.

Facts

The court below found it clear that the appellees Population Planning Associates and Hagen had standing as plaintiffs; it thus did not reach the question of the standing of the other appellees.[5] The appellees whose standing was considered by the court below are Population Planning Associates, Inc. [PPA], and the Reverend James B. Hagen [Hagen]. PPA is a North Carolina corporation which maintains an office in the County, City and State of New York. It engages in the mail order retail sale of non-prescription contraceptive devices; it publishes advertisements containing order forms for its products in both national and local periodicals circulated in New York State; it approves and fills orders for its products in its North Carolina office and mails these products to New York State residents.

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[5] The other appellees in this action are Population Services International [PSI], Drs. Anna T. Rand, Edward Elkin and Charles Arnold [Doctors], and John Doe. PSI is a North Carolina non-profit corporation with an office in the County, City and State of New York. Its objectives include the discovery and implementation of new methods of delivering contraceptive services and information to persons not receiving them, with the goal of reducing the miseries of unwanted pregnancy, disease and population growth.

The Doctors are physicians active in family planning, pediatrics and obstetrics-gynecology. They treat sexually active adolescents both over and under the age of sixteen and advocate the distribution of non-prescription contraceptives through non-medical and non-pharmacy outlets. John Doe is an adult male resident of New York whose access to contraceptive information and products and whose freedom to distribute the same to his children under the age of sixteen are prohibited by the statute here challenged.

PPA has several times been warned by appellants of the alleged illegality of these activities and threatened with prosecution. On December 1, 1971, a letter from appellant Sica indicated that an advertisement in a New York State college newspaper which allegedly "solicited the sale of condoms to students" was in violation of Education Law §6811(8). The letter demanded "future compliance with the law." A second letter, dated February 23, 1973, asserted that PPA's offer to sell male non-prescription contraceptives through magazine advertisements was also illegal. This letter stated: "In the event you fail to comply, the matter will be referred to our Attorney General for legal action." Finally, on September 4, 1974, PPA's New York office was visited by inspectors from the Board of Pharmacy. PPA's president was advised to stop selling contraceptives because such sale was in violation of the law. The inspectors further warned PPA that its violations of the law would be reported to the Board of Pharmacy, and indeed, such a report was made, and a copy left with PPA.[6]

Appellee Hagen is an ordained Episcopal minister, and rector of a church in New York. He is coordinator of the Sunset Action Group Against V.D., a group which sells and distributes male non-prescription contraceptive products to persons both over and under the age of sixteen in retail outlets which are not licensed pharmacies.

[6] Appellants assert in their jurisdictional statement (p. 9) that no legal action was threatened, that the inspection was only for "information purposes." However, the lower court specifically found that the inspectors threatened to report PPA to the Board of Pharmacy, a threat which was tantamount to a threat of prosecution. See Opinion of three-judge court (p. 5a).

Appellants in this action are the Governor and Attorney General of the State of New York, the Executive Secretary of the Board of Pharmacy of the State of New York, and the Board of Pharmacy. Appellants are responsible for the enforcement of the challenged statute.

Argument

The decision of the three-judge district court should be summarily affirmed. It is plainly correct and based upon well-established principles enunciated by this Court in numerous previous decisions. Such principles, and their application to this case, are so obvious as not to require further argument in this Court.

POINT I

Appellees have standing to challenge Education Law §6811(8), and a case or controversy is presented.

Contrary to appellants' unfounded assertions, it is clear that the court below properly held that appellees PPA and Hagen have standing and that they present a case or controversy.

Appellees are here asserting the privacy and First Amendment rights of those not parties to this action—residents of New York who are intolerably burdened in their access to contraceptives and contraceptive information. The latter have no forum in which to present their claims since the statute which affects their rights does not subject them to prosecution. In such situations it has long been settled that others closely allied in interest with these absent parties may assert their rights. See, e.g.,

N.A.A.C.P. v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1953). This doctrine has been found particularly apposite in cases involving the right of privacy. *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). In these cases several prerequisites are found to the right to assert constitutional *jus tertii.*

In *Griswold* v. *Connecticut, supra,* the seminal case in developing the right of privacy, it was recognized that physicians must be permitted to assert the constitutional rights of married users of contraceptives, because in no other way would there be a forum to assert those rights. The need for an expanded view of standing in such cases was explicitly noted again in *Eisenstadt* v. *Baird, supra,* at 445, fn. 1, in which an advocate of the right to use contraceptives was permitted to assert those rights on behalf of single people.

The Court explained in greater detail the factors which made Baird a proper litigant:

> "[T]he relationship between Baird and those whose rights he seeks to assert is . . . that between *an advocate of the rights of persons to obtain contraceptives and those desirous of doing so* . . . [M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." 405 U.S. at 445. (Emphasis added.)

And in *Doe* v. *Bolton, supra,* plaintiffs were permitted to raise third party privacy rights in challenging a statute which "directly operated" against them. 410 U.S. at 188.

In the instant case, appellees clearly meet the criteria for standing established by this Court. If these appellees do not have standing, no person could challenge this statute. Appellees are "advocate[s] of the rights of persons to obtain contraceptives," and this litigation will have the important effect of vindicating the rights of those affected persons who are otherwise unable to assert them. The statute "directly operates" against appellees.[7]

Appellants further claim a lack of a case or controversy because appellees have not been prosecuted under the statute. However, this Court has found that an actual prosecution is not essential. *Doe* v. *Bolton, supra.* Indeed, lower courts have recognized that "under *Bolton* . . . all that is required for justiciability and standing is that the criminal statute directly operate against the party seeking relief." *Associated Students for U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, 19 (C.D. Cal. 1973). See also *Friendship Medical Center, Ltd.* v. *Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir.), *cert. den.,* —— U.S. ——, 95 S. Ct. 1438 (1975) (although appellant physicians were actually *in compliance* with the challenged statute, the Seventh Circuit held that the continuing effect of the statute in forcing compliance through fear of prosecution gave the physicians standing). See also *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

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[7] The court below, as noted, did not pass on the standing of appellees PSI, Doctors and John Doe. It is evident, however, that they too have standing. PSI seeks to distribute contraceptives and information about such products and is barred from doing so by Education Law §6811(8), which "directly operates" against it. The Doctors are similarly hampered in distributing contraceptives and information and in their advocacy of the availability of contraceptives in non-medical and non-pharmaceutical places. John Doe is himself hindered in his access to contraceptives and information, and is proscribed from giving the same to his minor children.

It is clear also that appellees' fear of prosecution is far from "chimerical," despite any innocuous intent appellants may ascribe to the threatening communications and visit from the Board of Pharmacy and its inspectors. Therefore, it is irrelevant that they have not yet been prosecuted.[8]

Finally, appellants can hardly claim that Education Law §6811(8) is "moribund." *Doe* v. *Bolton, supra,* at 188. Although there are no officially reported prosecutions under it, there are several prosecutions recorded under its predecessor statute, §1142 of the Penal Law. The last of these was in 1965.[9] The legislature still finds the law of passionate interest; as appellants' own jurisdictional statement declares, long and heated debate has occurred over this statute, resulting in its re-enactment in 1971 and its reaffirmation, after legislative attack, in 1974. The law clearly remains vital.

Even were there no prior prosecutions, this Court has not found the absence of prosecutions, even for nearly forty years, a barrier to the adjudication of the consti-

[8] Appellants' reliance on *Poe* v. *Ullman*, 367 U.S. 497 (1961), ignores the substantial developments embodied in *Doe, Eisenstadt* and *Steffel,* which have occurred with regard to standing since *Poe* was decided. These developments have been particularly marked in the question of third party standing to raise the right of privacy. *Poe* is inapposite, moreover, because there Connecticut clearly had no intention of enforcing its law. Here, appellants themselves have made manifest the State's interest in compliance with Education Law §6811(8).

[9] *People* v. *Baird,* 47 Misc.2d 478, 262 N.Y.S.2d 947 (Sup. Ct. Nassau Co. 1965); *People* v. *Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918), *app. dism.* 251 U.S. 537 (1919); *People* v. *Byrne,* 99 Misc. 1, 163 N.Y.S. 682 (1917). See also Op. Atty. Gen., 45 St. Dept. 308 (1932) (sale of prophylactics in coin machine illegal under §1142).

tutionality of a statute. See *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), recently approved in *Doe* v. *Bolton, supra,* at 188.

It is thus plain beyond peradventure that appellees have standing to raise the privacy rights of third parties, and that a case or controversy is presented, as was decided by the lower court. Standing is equally clear with regard to appellees' First Amendment claims. It cannot now be asserted that the rights of one who wishes to disseminate information are any less weighty than those of one who wishes to receive it. See, *inter alia, Griswold* v. *Connecticut, supra,* at 482-3; *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *New York Times Co.* v. *United States,* 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

POINT II

The constitutional right of privacy includes the fundamental right of access to contraceptives.

The right of privacy, judicially recognized in *Griswold* v. *Connecticut,* and further explicated in *Eisenstadt* v. *Baird, Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* is firmly established. Though neither its precise origins nor its precise reach is yet determined, it seems incontrovertible that it must contain and protect the right of access to contraceptives.

In *Griswold* v. *Connecticut, supra,* this Court first recognized a right of privacy which extended to the use of contraceptives by married couples. The privacy right itself was found to stem from the constitutional guarantees

found in the First, Fourth, Fifth, Ninth and Fourteenth Amendments; it was found in the "penumbras" of those guarantees; in the "fundamental" liberties of the "traditions and conscience of our people"; in values "implicit in the concept of ordered liberty"; and in the concept of "liberty" itself. The marital relationship was found protected by the right of privacy because of its historically inviolate nature. Thus, any law affecting this relationship was required to justify its invasion of the privacy right.

In extending the protection of the right of privacy to unmarried contraceptive users, pursuant to the mandate of the Equal Protection Clause, this Court restated the nature of the right and effectively broadened it beyond the confines of marriage, suggesting that, indeed, the right announced in *Griswold* was the right to engage in sexual intercourse, rather than simply a right explicitly related to marriage. The Court in *Eisenstadt* held, at 453:

> "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."

See also *Note, On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U. L. Rev. 670, 733 (1973) [Hereinafter, *Note, On Privacy*].

Finally, in *Roe* v. *Wade,* the right was found to extend to a woman's decision whether or not to terminate her pregnancy. The personal privacy right, as well as those rights encompassed by it, was termed "fundamental," and any restriction upon it held to be improper unless justified by a "compelling" state interest.

Although there has been some confusion and debate regarding the process by which a right is determined to be fundamental, see, e.g., *Note, On Privacy, supra,* at 701-703, it is clear that personal privacy extends to " 'the most intimate phases of personal life' having to do with sexual intercourse and its possible consequences," *Roe* v. *Ingraham,* 480 F.2d 102, 107 (2d Cir. 1973). See also *Stanley* v. *Georgia,* 394 U.S. 557 (1969) and *Loving* v. *Virginia,* 388 U.S. 1 (1967). Obviously, the right of access to contraceptives is essential to the exercise of the right to use contraceptives, and therefore must similarly be found fundamental and an aspect of the privacy right. See *Note, On Privacy, supra,* at 706 n. 221.

Implicit in this Court's decisions is an understanding that the right to use contraceptives necessarily carries with it a right of access to contraceptives. Clearly, individuals do not have an effective right to use contraceptives unless they have access to them and to information concerning them. Since recognition of a hollow, meaningless right can hardly have been the intention of this Court, it is clear that this Court meant, when it recognized the right of contraceptive use, to recognize the full spectrum of rights which would make the principal right meaningful. In *Griswold,* this Court indicated clearly its understanding of this premise when it declared that specific constitutional rights are insured only by the protection of various peripheral rights, for "without these peripheral rights, the specific rights would be less secure." 381 U.S. at 482-483. In *Griswold* and *Eisenstadt,* this Court implicitly recognized the closely interrelated nature of the right to use and the right to access, by granting standing to represent the rights of *users* of contraceptives to those who in fact provided

access to contraceptives. Thus, inherent in each of these decisions explicating the right to privacy, is the recognition that the broad reach of the personal privacy right encompasses the right to access of contraceptive devices and to information concerning them.[10]

Since the right of access to contraceptives is fundamental, only a "compelling state interest" may justify its infringement.[11] *Roe* v. *Wade, supra.*

Moreover, this Court may find, as did the court below, that it is unnecessary even to reach the question of fundamentality, for the statute here challenged must fall even if evaluated by the intermediate test enunciated by the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir.), *rev'd on other grounds,* 416 U.S. 1 (1974). That test requires that a statute be "carefully scrutinized" if it infringes upon a personal right; it may stand only if closely related in fact to a legitimate state interest. 476

[10] This Court made an analogous finding in *Roe* v. *Wade* and *Doe* v. *Bolton,* in which it was held unconstitutional to prosecute doctors for performing abortions. Had the Court there found a disjuncture between the right to abortion and the right of access to abortion, it would have upheld laws under which doctors were prosecuted, and struck down only those under which pregnant women were prosecuted. It would be anomalous for this Court now to hold with regard to contraceptives that users may not be prosecuted but distributors may.

[11] Appellants err, on page 10 of their jurisdictional statement, by suggesting that the District Court inappropriately applied a test relative to a fundamental state interest. The District Court applied an intermediate test to the right, and since it thereunder found the statute unconstitutional, it had no need to find the right of access to be fundamental, and thus did not reach the issue (pp. 12-13a). Appellants are totally in error, moreover, when they suggest that a "rational relationship" test should have been applied. The District Court clearly and correctly found that the right of access was an aspect of the right to privacy, and its infringement therefore subject to strict scrutiny.

F.2d at 814-815. The court below correctly found that Education Law §6811(8) could not meet this test of close relationship since it furthers no conceivable state interest; thus the question of whether access to contraceptives is fundamental was not reached.

In the instant case, the result is the same whether the strict "compelling interest" test, the intermediate "substantial relationship" test, or even the most lenient and uncritical "rational relationship" test is applied: the statute cannot be shown to have even the most tangential relationship to any legitimate state interest and it must be struck down.

POINT III

Education Law §6811(8) infringes the constitutional right to obtain contraceptives by limiting distribution of non-prescription contraceptives to pharmacists.

Obviously, by limiting sale of non-prescription contraceptives to licensed pharmacists, the statute here challenged severely restricts and limits the right to obtain contraceptives. Therefore, the state interest supporting this statute must be examined to determine whether it is compelling, or legitimate and substantially furthered by the statute, or even rational. Appellees submit that it is none of the above.

Appellants suggest that this provision is justified by administrative convenience, by the need to have knowledgeable persons dispensing contraceptives, and by a "concern that young people not sell contraceptives." The first of these, administrative convenience in enforcing the remainder of the statute, is clearly inapposite, because the entire

statute is unconstitutional. Moreover, even if the other provisions were valid, there is no perceptible reason, as the court below found, why pharmacists can better limit sale to young persons or prevent advertising and display than other storekeepers. Even if they could, mere considerations of administrative convenience here are not so weighty as to permit infringement of constitutional rights. See, *e.g., Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

Indeed, since non-prescription items are here at issue, there is no rational reason why a person with the knowledge and background of a pharmacist is needed to dispense them, as opposed to the numerous other non-prescription products dispensed by the normal panoply of purveyors. The restriction to pharmacists clearly makes the statute overbroad as a health measure, since no health hazards are present with regard to the use of non-prescription devices. *See Eisenstadt* v. *Baird, supra,* at 451:

> "[T]o sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right [to contraceptives]." *Id.* at 464 (concurring opinion).[12]

Finally, the statute is far too overbroad as a means of preventing young persons from *selling* contraceptives.[13] There are much narrower ways of accomplishing the same goal, such as legislating as to the required age of sellers of contraceptives. When it is permissible at all to burden

[12] This provision may not alternatively be upheld as a control on quality. Pharmacists have no control over the quality of the prepackaged contraceptives they receive, which are in any case controlled by the Federal government. See 21 U.S.C. §321(h).

[13] This novel suggestion was neither made nor considered in the court below.

the exercise of a constitutional right, the least restrictive alternative must of course be used. See, *e.g., Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Plainly, none of these purported justifications supports this statute. Even, assuming *arguendo,* that they may seek to further legitimate State objectives, this statute clearly is neither a useful nor a proper nor a rational method of realizing those objectives.[14]

POINT IV

Education Law §6811(8) violates the constitutional rights of minors by prohibiting them from obtaining contraceptives.

Sale and distribution of contraceptives to minors are prohibited by the terms of the statute here challenged.[15] In that respect, the statute violates the privacy rights of minors and the Equal Protection Clause of the Fourteenth Amendment.

[14] Appellants also appear to imply that the statute may stand because it does not seriously infringe appellees' rights. They allege in their jurisdictional statement to this Court (p. 11): "[I]t cannot really be disputed that such products are readily available to these individuals in New York State and appellees have not seriously disputed such fact." Quite to the contrary, appellees *vigorously* dispute such fact. It is disingenuous for appellants to suggest that the law may be preserved because it is not seriously enforced, when these very appellants have sought to enforce the law to the detriment of these appellees.

[15] Appellants have asserted that contraceptives may legally be dispensed to minors by a physician. The lower court found it unnecessary to rule on this issue. Appellees maintain that the plain words of the statute do not permit appellants' interpretation; nevertheless, even if it is correct, a restriction on distribution to minors which permits only distribution by physicians is still an invasion of the rights of minors and likewise constitutionally infirm.

It can no longer be seriously argued, despite appellants' assertions, that "[m]inority as a special classification has always had judicial sanction" (jurisdictional statement, p. 13). Such a claim ignores years of constitutional law. Equal protection of the laws was fully extended to minors in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and the rights of due process in *In Re Gault,* 387 U.S. 1 (1967). The principle that children are entitled to constitutional protection no less than that of adults was reiterated in *Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969) and recently in *Goss* v. *Lopez,* —— U.S. ——, 95 S. Ct. 729 (1975); *Wood* v. *Strickland,* —— U.S. ——, 95 S. Ct. 992 (1975); *Breed* v. *Jones,* —— U.S. ——, 95 S. Ct. 1779 (1975). None of these cases specifically extends the right of privacy to minors; they do, however, unequivocally indicate that minors may not be denied such a fundamental right solely on the basis of their age.

Numerous lower courts have found that minors are fully entitled to the right of privacy. In *T. H.* v. *Jones,* —— F. Supp. ——, Civ. No. 74-276 (D. Utah, July 22, 1975) (three-judge court), a state requirement that minors obtain parental consent in order to have access to contraceptives was invalidated. In a thoughtful opinion the court noted, *inter alia,*

> "[W]e perceive no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials. *The interest of minors in access to contraceptives is one of fundamental importance* . . . We hold that the fundamental nature of minors' right to privacy must be considered in assessing the constitutionality of state imposed restrictions on access to contraceptives." Slip Opinion at p. 12. (Emphasis added.)

Many other cases have reached like results. See, *e.g., Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *Wolfe* v. *Schroering,* 388 F. Supp. 631 (W.D. Ky. 1974) (three-judge court); *Coe* v. *Gerstein,* 376 F. Supp. 695 (S.D. Fla.) (three-judge court), *app. dism.* 417 U.S. 279 (1974); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah 1973) (three-judge court); *Merriken* v. *Cressman,* 364 F. Supp. 913 (E.D. Pa. 1973); *Washington* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 272 (1975); *In Re P. J.,* 12 Crim. L. Rep. 2549 (D.C. Super. Ct. 1973). See also *Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy,* 88 Harv. L. Rev. 1001 (1975); *Rights of Choice in Matters Relating to Human Reproduction: Part I of a Symposium on Law and Population,* 6 Colum. Human Rights L. Rev. 1-534 (1974-75); see particularly Paul, *Legal Rights of Minors to Sex-Related Medical Care, id.* at p. 358.[16]

New York State seeks to justify its discrimination against minors by asserting an interest in "heighten[ing] the importance society attaches to a decision to partake in sexual activity at such a young age," (p. 12) and by baldly asserting without any support whatsoever and contrary to the available evidence[17] that "exposure of minors to contraceptives . . . would encourage promiscuity" (p. 14). These goals, even if legitimate, are in no way furthered by Education Law §6811(8).

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[16] Appellants' attempts to support their argument that a state may at will discriminate against a minor are not aided by cases such as *Interstate Circuit* v. *Dallas,* 390 U.S. 676 (1968) and *Ginsberg* v. *New York,* 390 U.S. 629 (1968). These cases concern obscenity and pornography, neither of which is constitutionally protected, while the instant case concerns a fundamentally protected right.

[17] See footnote 10 to Opinion of three-judge court (p. 32a), and accompanying text (p. 15a), and sources cited therein. Appellees find it unnecessary to controvert each of the legislative assertions set forth in appellants' jurisdictional statement at pp. 3-4. Their irrationality and illegitimacy is plain on their faces.

Appellees will first note, as did the court below, that appellants themselves have conceded that "'there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives . . .'"[18] Appellants merely *hope* without rational basis, that Education Law §6811(8) reduces sexual activity by minors. While such a blunderbuss position is conceivably acceptable where no important interest is at stake, it cannot be maintained when a fundamental constitutional right is infringed by the statute in question. This statute, then, may not be justified by such a flimsy state "interest."[19]

Additionally, appellants have not come forward with even a scintilla of evidence to indicate that by restricting a minor's access to contraceptives, the minor will be impressed with the importance of sexual activity. One could much more reasonably posit that a minor who intends to engage in sexual intercourse and finds contraceptives unavailable will find that society advocates sexual activity without responsibility.

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[18] Opinion, at p. 15a.

[19] The State's approach to sexual intercourse by minors is, moreover, somewhat schizophrenic. The State permits a doctor to treat a minor for venereal disease without the consent or knowledge of the minor's parents or guardian. Public Health Law §2305(2). Similarly, it permits a minor to have an abortion without parental consent. Penal Law §125.05. It permits some consensual intercourse by minors, and permits a female to marry below the age of sixteen. N.Y. Dom. Rel. Law §15(2)-(3). And, as noted by the District Court, it makes exceptions to §6811(8), in New York Social Services Law §350(1)(e) and §365-a(3)(e) (pp. 16a, 17a). Finally, if appellants' interpretation of §6811(8) is correct, an exception is also made by permitting doctors to distribute contraceptives to minors. (Appellants' interpretation of the Social Services Law, however, is not evident upon the face of the statute, nor was it ever maintained in the lower courts. Appellants may not be permitted at each judicial level to reinterpret the laws of New York to suit their purposes of the moment.)

Further, as the three-judge court found, the appellants have in no way "challenged the view that when sexual intercourse takes place, venereal disease and pregnancy are more likely to occur when contraceptives are not used."[20] Therefore, appellants may be assumed to be aware of the severity of these consequences and to intend them as sanctions for sexual intercourse not approved by the State.

This Court may take judicial notice, as did the District Court, that minors who engage in sexual activity without contraceptives are subject to precisely the same risks and consequences as adults. They become pregnant, they have children or abortions, and they contract venereal disease. These consequences are simply more tragic in minors than in adults. Minors are less able physically, emotionally and economically, to cope with unwanted pregnancy or children. Their babies are less healthy than those of adults and are subject to greater emotional and economic deprivation than those of adults. The ravages of venereal disease will leave permanent effects. These are facts about which there is and can be no controversy. See opinion of three-judge court, at p. 16a and footnotes 12-16, pp. 32-33a and sources cited therein. See also Paul, *Legal Rights of Minors, supra,* at 358; Note, *Privacy Rights of Minors, supra,* at 1009-1010. Yet, appellants somehow seek to persuade the Court that real tragedies are less important than some ephemeral notion of impressing children with society's alleged view of sexual activity. In effect, appellants are voicing approval of the practical result of Education Law §6811(8), which is the punishment, by pregnancy or venereal disease, of minors who engage in intercourse. Such a result is untenable. As the Court said in *Eisenstadt* v. *Baird, supra*:

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[20] Opinion, at p. 16a.

> "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication * * * Aside from the scheme of values that assumption would attribute to the state, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proferred objective." 405 U.S. at 448.

See also *Associated Students for the Univ. of Cal. at Riverside, supra,* at 22 n. 3.

Finally, appellants' attempts to equate access to contraceptives with access to alcoholic beverages and obscene material are utterly unreasonable. Alcohol and obscene materials are neither constitutionally protected, nor are they beneficial to any person, minor or adult; rather, they are often harmful to both. Non-prescription contraceptives, on the other hand, are both constitutionally protected and of proven benefit to both sexually active minors and adults; no harm may be shown to either. As to the right to vote, while it is constitutionally protected, it is clear that valid reasons may be put forth to restrict the vote to people who are of an age to participate rationally in the political process, and there is no way of determining in each case what this age is. However, it is clear that there is an obvious way of determining at what time a person has the right of access to contraceptives. The right inheres at the onset of sexual activity.

The State's objectives in barring minors from access to contraceptives, even if they are legitimate (which appellees do not concede), are in no way advanced by Education Law §6811(8). Therefore, this statute was properly declared an unconstitutional violation of the right of privacy and the Equal Protection Clause.

POINT V

The statutory prohibition of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment as well as an unconstitutional burden upon the protected right to use and distribute such contraceptives.

Education Law §6811(8) places an absolute ban on display or advertisement of all contraceptives, including nonprescription contraceptives. New York has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut, supra,* 381 U.S. at 482, and to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453.

It is of course hornbook law that any statutory prior restraint of free speech and expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, 57 (1965); *Thomas* v. *Collins,* 323 U.S. 516, 529-530 (1945); *Near* v. *Minnesota,* 283 U.S. 697 (1931). The State "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *New York Times Co.* v. *United States, supra,* 403 U.S. at 714.

Appellants do not dispute that the statute here challenged is in fact a prior restraint, but seek instead to withdraw the speech thereby prohibited from the realm of protected

speech by calling it "commercial." However, it is clear that "[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966). See also *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 384 (1973). Mere utterance of the talismanic phrase "commercial speech," then, is not sufficient to support appellants' position.

This Court has most recently considered the protections to be afforded to speech in a commercial context in *Bigelow* v. *Commonwealth of Virginia,* —— U.S. ——, 95 S. Ct. 2222 (1975). In *Bigelow,* the Court indicated that in examining the extent to which commercial advertising may be regulated, First Amendment interests must be weighed with governmental interests. There, the advertisement in issue concerned abortion referral services. It was held that since " . . . the activity advertised pertained to constitutional interests . . . [and] . . . appellants' First Amendment interests coincided with the constitutional interests of the general public" the advertisement could not validly be proscribed, —— U.S. ——, 95 S. Ct. at 2233. Thus, while commercial advertising might be regulable if the underlying activity being publicized is illegal, as in *Pittsburgh Press,* or simply unprotected, as in *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. den. sub nom. Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), if the publicized activity is of constitutional import, its advertisement may not be prohibited. The "commercial speech" exception to the protection of the First Amendment, so off-handedly enunciated in *Valentine* v. *Chrestenson,* 316 U.S. 52 (1942),[21] is entirely inapplicable where the content of commercial speech is information regarding activity protected by the constitution.

[21] See *Cammarano* v. *United States,* 358 U.S. 498 (1959) (Douglas, J., concurring).

Lower courts have so interpreted this Court's rulings in the area of "commercial speech." In *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (N.D. Cal. 1975) (three-judge court), state laws prohibiting the advertising of prices for prescription drugs were stricken as violative of the First Amendment. The *Terry* court's well-reasoned opinion found a measure of constitutional protection for the advertising, and though it did not find the interest involved to be fundamental, it did find that its importance outweighed the State interest asserted against the advertising of prescription drug prices. The same rationale was applied, and the same result reached, in *Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy,* 373 F. Supp. 683 (E.D. Va. 1974) (three-judge court), *prob. juris. noted,* —— U.S. ——, 95 S. Ct. 1389 (1975).

Similar principles were held to govern dissemination of abortion and contraceptive information in *Associated Students for the U. of Cal. at Riverside* v. *Attorney General, supra,* and *Atlanta Cooperative News Project* v. *United States Postal Service,* 350 F. Supp. 234 (N.D. Ga. 1972) (three-judge court). In both cases regulations against mailing informational advertisements were struck down as violative of the First Amendment. See also the scholarly dissent of Judge J. Skelly Wright in *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 587 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co.* v. *Kleindeinst,* 405 U.S. 1000 (1972), which would extend First Amendment protection to *all* advertising.

The instant case is surely one which, under the relevant criteria, requires that the challenged restraint on advertising be declared unconstitutional. The advertising here concerns a fundamental constitutional right, as did that in *Bigelow*—the right of privacy in the use of one's own body. Appellees' concern is that all persons receive the knowledge that will enable them to exercise their constitutional right of privacy. Moreover, there is no state interest which is sufficiently compelling, or even legitimate, which is substantially related to the suppression of information regarding contraceptives.[22]

Appellants offer two purported state interests which are allegedly served by the ban on contraceptive advertising or display contained in Education Law §6811(8). One is that individuals not be exposed to purported embarrassment from such advertising and display. The other is that such advertising and display will lead to legitimization and increase of sexual activity among young people.

As to the first contention, it is sufficient to note that protected speech will not be rendered the less so because it is found offensive by some people. *Cohen* v. *California*, 403 U.S. 15 (1971); *Erznoznik* v. *City of Jacksonville*, —— U.S. ——, 95 S. Ct. 2268 (1975); *Salem Inn, Inc.* v. *Franx*, —— F.2d ——, No. 75-7101 (2d Cir. Aug. 28, 1975).[23] As to the State's second contention, of increased promis-

[22] Appellees respectfully disagree with the District Court's conclusion that a statute could be drawn which could regulate appellees' contraceptive advertisements, for the reasons set forth above; however, since the statute which is before the Court clearly cannot pass constitutional muster, this issue need not be reached.

[23] Appellees concur with the lower court that any obscene advertisement is regulable under the decisions of this Court; however, there is no issue of obscene advertising raised in this case.

cuity, appellants have presented no evidence whatsoever that any such result would occur, and it seems certain that if they could not show that actual access to contraceptives will increase sexual activity, it is dubious at best that they could show that information about contraceptives will lead to such an increase. Thus, neither "interest" may support this statute.

Finally, of course, the statute is overbroad, as was found by the district court. By its terms, it limits *any* publication of information regarding contraceptives. It is beyond dispute that some, even if not all, published discussion of contraceptives is protected. See *Bigelow, Associated Students,* and *Atlanta Cooperative, supra.* Thus, even if a statute could be written to regulate some contraceptive advertisements, this statute is clearly unconstitutional. See *Bigelow* v. *Virginia, supra; Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973); *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965).[24]

[24] Appellants, despite their efforts (p. 16), cannot distinguish *Bigelow, supra,* which involved an advertisement just as "commercial" as that here. Moreover, appellants cannot counter the lower court's finding of overbreadth with cases and principles concerning vagueness, as they have. Such cases are entirely inapposite.

CONCLUSION

Appellees respectfully submit that the District Court was manifestly correct in its holding that each provision of §6811(8) of the New York State Education Law is unconstitutional, as is clearly shown by the authorities herein cited. Accordingly, appellees respectfully urge that this Court grant the within motion, and affirm the decision of the court below without further argument.

Dated: New York, New York
October 21, 1975

Respectfully submitted,

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• Attorneys for appellees gratefully acknowledge the dedicated research and writing assistance of Ms. Karen Wagner, third-year student at New York University School of Law.